UPREME COURT, U. S. No. 16

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, ORDER OF RAILROAD CONDUCTORS AND BRAKEMEN, and SWITCHMEN'S UNION OF NORTH AMERICA ..... *Appellants*

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and THE TEXAS AND PACIFIC RAILWAY COMPANY ..... *Appellees*

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF ARKANSAS

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

JAMES E. YOUNGDAHL
711 West Third Street
Little Rock, Arkansas 72201
Attorney for the Appellants

Of Counsel:
ROBERT D. ROSS
JOHN P. SIZEMORE
McMATH, LEATHERMAN, WOODS & YOUNGDAHL
POPE, PRATT, SHAMBURGER, BUFFALO & ROSS
Little Rock, Arkansas

No. 950

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, ORDER OF RAILROAD CONDUCTORS AND BRAKEMEN, and SWITCHMEN'S UNION OF NORTH AMERICA ——— *Appellants*

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and THE TEXAS AND PACIFIC RAILWAY COMPANY ——— *Appellees*

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Appellants submit this brief opposing the Motion to Affirm in accordance with Rule 16(4) of this Court.

The following reply is generated by the conviction that the Motion to Affirm consists substantially of repetitive distortions which, if unchallenged, might interfere with consideration of the record to the extent necessary for resolution of the jurisdictional question. Two illustrations, one procedural and one substantive, should suffice.

The simplest example of pervasive unreliability in railroad advocacy is a procedural comment in the statement of the case in the Motion to Affirm.

> Furthermore, the Brotherhood of Locomotive Engineers *concedes the correctness of the judgment of the District Court* and declined to join in this appeal (see Letter of Counsel for Appellants to Honorable John F. Davis, dated October 30, 1967).

Motion to Affirm 6, n. 1. (Emphasis added.)

The sole purported basis for this assertion is the following paragraph, the only portion of the letter cited which deals with the Brotherhood of Locomotive Engineers.

> Pursuant to Rule 10 of the Rules of the Supreme Court of the United States, I hereby state that the Brotherhood of Locomotive Engineers, one of the intervenors below has decided not to participate in this appeal. I am not sure exactly how Rule 10, paragraph 4, applies in this situation, but as attorney for the Brotherhood of Locomotive Engineers I can represent their position to be in accordance with what I stated. You may note that on the Notice of Appeal I have omitted the name of this organization as an appellant.

Over and over again, the railroads discuss their view of selected portions of the evidence; cost of compliance is representative. Motion to Affirm 16-17, 29, 59, 62-63.

> The evidence shows that the Arkansas statutes impose an annual cost burden on the appellee railroads, which would be eliminated in the absence of the statutory provisions, of approximately $7,600,000.00.

Motion to Affirm 62. Not only is such conclusion unsupported by any substantial evidence; it is destroyed by calculations available from the working papers of railroad witnesses themselves.

Obviously cost of compliance is net cost. Analysis of the monetary consequences of any change necessitates computing the cost of the prior condition, estimating the cost

the subsequent condition would require, and subtracting one from the other. The appellees may have taken the first step, but have ignored the second and third completely.

The record does not include a complete account of the new costs which would result from invalidation of the Arkansas full crew laws. Counsel for the railroad supplied one: extra payments to engineers who operate without firemen. T. 775; see Motion to Affirm 12, n. 1. Evidence offered by the appellees also describes benefit allowances of the arbitration award which would have a substantial cost impact for some years. See PX 20, pp. 84-87, 94. A recurrent theme of all witnesses, that smaller crews require more time to perform operating duties, indicates increased overtime, "progressive" and "constructive" allowance payments to the members of a smaller crew. See T. 747-49. Many more intangible offsets, such as those created by an expanding accident rate (*cf.* T. 165-66), can be inferred. T. 745-46.

The best indication of the real cost of compliance was developed by a witness for the brotherhoods. T. 754-59; IX 66. Officials of the Kansas City Southern had included in their pre-trial testimony some detailed and validated figures employed during cost of compliance calculations. PX 66; IRX 66. It became therefore possible to determine the relative changes in per mile enginecrew and traincrew employment costs in Arkansas under the full crew laws, as compared with similar developments in other states where crews have been reduced in the last four years.

The remarkable thing about these calculations is that there is practically no difference in the crew cost ratios between Arkansas and other states before and after operating crews were reduced in those other states!

As to freight enginemen for the Kansas City Southern, the percentage cost for Arkansas as compared with the sys-

tem as a whole actually *declined* between 1962 and 1965, the period spanning the arbitration award which eliminated most firemen outside of Arkansas. IX 66, p. 5, col. 4 (24.7%, 23.6%, 24.1%, 23.0%). As to freight trainmen, the same result obtained. IX 66, p. 6, col. 4 (22.1%, 22.0%, 22.2%, 21.6%).

Lest the above figures be dismissed as possibly reflecting some change in total mileage, the per mile expenditure is also available. Most significantly, in the 1962-65 period, the ratio of Arkansas to the Kansas City Southern system as a whole went down as to enginemen (1.119, 1.066, 1.118, 1.080) and rose only slightly as to trainmen (1.000, .992, 1.029, 1.014). IX 66, p. 4, col. 4. The decline in the last two years of Arkansas trainmen expense should receive special attention in light of a national traincrew reduction which was more gradual than that of firemen as a result of the arbitration award. See T. 354-55.

These figures, the only ones in the record besides assertions inadequate as proof, compel the conclusion that cost of compliance is minimal, if measurable at all.

This failure of proof may be the most dramatic, but it is not different in kind from other defects in the railroad assumption of the burden of proving unconstitutionality. Its contrast with the unqualified assertions of the Motion to Affirm is representative, as well, of the relationship between that document and the actual record at bar.

Appellants believe that the Motion to Affirm does not present persuasive argument that the question presented by this appeal is not substantial or of public importance.

Respectfully submitted,

JAMES E. YOUNGDAHL
711 West Third Street
Little Rock, Arkansas 72201
Attorney for the Appellants

Of Counsel:

ROBERT D. ROSS
JOHN P. SIZEMORE
McMATH, LEATHERMAN, WOODS & YOUNGDAHL
POPE, PRATT, SHAMBURGER, BUFFALO & ROSS
Little Rock, Arkansas